STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER VENNIE MACKLIN,

Defendant-Appellant.

UNPUBLISHED
September 7, 1999

No. 190994, 196822
Recorder's Court
LC No. 95-3480-01

Before: White, P.J., and Kelly and Hoekstra, JJ.,

PER CURIAM.

Defendant was charged with second-degree murder (victim Melvin Hill), MCL 750.317; MSA 28.549, assault with intent to murder (victim Anton Cargile), MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was found not guilty of the assault charge and guilty of felony-firearm. The jury hung on the murder charge. He was then retried on the murder charge and convicted. His consolidated appeals are before us. We affirm.

Defendant's girlfriend lived across the street from Hill. Defendant slept there as well. Defendant's girlfriend owed Hill twenty dollars. Hill and his friend Cargile broke into defendant's girlfriend's house (the front-door lock was broken) and were apparently in the process of taking defendant's television to satisfy the debt when defendant caught them. They left, stating that they would be back, and returned with Hill's cousin, Karl Hill. Defendant armed himself with a gun. When the men returned and all four men were outside, in front of defendant's girlfriend's house, defendant had the gun in his hand, Cargile attacked defendant from the back or side, and Hill was shot. There was testimony that Hill was shot by accident when Cargile attacked defendant. There was also testimony that the gun was pointed at Hill, that there was more than one shot, and that defendant shot at Cargile.

Hill was shot in the neck and was taken to the hospital. His condition was assessed as temporarily serious and he was expected to recover, although he was paralyzed from the neck down, and had to have a tracheotomy and breathing tube to be able to breathe. Defendant was charged with assault and gave a statement. Later, Hill apparently extubated himself and died as a result. Police then took another statement from defendant, without counsel, and he was charged with murder.

I

Defendant first argues that his motions for directed verdict of dismissal of the murder charge, made at both trials, should have been granted because there was insufficient evidence that his actions caused Hill's death, and that his retrial on the murder charge violated his right to be free from double jeopardy because he was entitled to a directed verdict of acquittal in the first trial. Defendant asserts that Hill's medical condition was stable and that he was recovering from the gunshot wound when he committed suicide by removing the tracheal tube, and that this intervening act disrupted causation as a matter of law.

The testimony regarding cause of death was fairly scant in the first trial. An assistant medical examiner testified that the Hill autopsy was conducted by a colleague in the medical examiner's office, Dr. Cassin, who prepared a report. Dr. Cassin concluded that the cause of death was "a single gunshot wound of the neck." The wound perforated soft tissue of the neck and also resulted in damage to the cervical spine. The witness also testified that she conducted a brief and incomplete review of the hospital medical record that morning and stated, based on the record, that Hill became a quadriplegic and underwent surgery to decompress the cervical vertebrae injured by the gunshot wound, that he had a tracheotomy to support breathing, and that he died six days after admission. When asked how the victim died according to the hospital record, the witness testified that the hospital record stated "the nurse found the tracheotomy tube was pulled off by deceased and the lung secretion on that area and was found dead."

Defendant sought a directed verdict of dismissal on the causation issue, which was denied, the court determining that there was a question of fact. Defendant briefly touched on the causation issue in closing,[1] but his main defenses were accident and self-defense. In the second trial, Dr. Sawait Kanluen, the Chief Medical Examiner, who also had not performed the autopsy, testified regarding cause of death based on Dr. Cassin's records. Dr. Kanluen testified that the cause of death was "due to a through and through gunshot wound of the neck … complicated by the difficulty breathing and there's some seepage and blockage out internally." On cross-examination, Dr. Kanluen conceded that the "mechanism of death" may have been the tracheal tube's removal, but continued to maintain that the cause of death was the gunshot wound. It was conceded that no one could provide any evidence regarding how the tube was removed.

When ruling on a motion for directed verdict of acquittal, courts must consider the evidence presented by the prosecution up to the time the motion is made, view that evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant was not entitled to a directed verdict in either trial, and the court did not err in submitting the issue to the jury . Defendant asserts that Hill either committed suicide or was the victim of gross negligence, and that either would be an intervening cause. However, simply because Hill apparently extubated on his own does not mean that he committed suicide. In any event, the

determination of proximate cause or of the existence of an independent intervening cause of death is an issue for the jury. *People v Clark,* 171 Mich App 656, 659; 431 NW2d 88 (1988). The concept of an intervening cause is predicated on foreseeability. *Id.* The question whether accidental extubation or extubation without full understanding of the consequences, or even intentional extubation[2] was a natural and probable complication of the gunshot wound that caused the need for intubation to facilitate breathing, and was not the result of an independent intervening cause in which defendant did not participate and which he could not foresee, was properly left to the jury. *Id.;* see *People v Bowles,* 234 Mich App 345, 349-351; 594 NW2d 100 (1999).

II

Similarly, defendant's assertion that the court erred in failing to instruct sua sponte on the concept of suicide being an intervening cause also fails.

Generally, appellate review of instructional error is precluded absent an objection, unless manifest injustice would result. *People v Van Dornsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). Reversal is not required if the instructions fairly informed the jury of its responsibilities. *People v Storch,* 176 Mich App 414, 418; 440 NW2d 14 (1989).

The court gave the general causation instruction requested, CJI 16.15. Defendant asserts that the court should also have given CJI 16.16, although not requested and although not applicable to suicide. The failure to give such an instruction did not result in manifest injustice; the instructions as given adequately informed the jury regarding the causation requirement.

III

Defendant next asserts that the court erred in admitting his second statement to police where the second statement was taken in violation of his Sixth amendment right to counsel. Defendant also argues that counsel was ineffective in failing to seek suppression of the second statement. Accepting, *arguendo,* that the second statement was taken in violation of defendant's rights,[3] the record shows that defendant made a reasonable and informed decision to waive assertion of that right, and instead have the exculpatory statement presented to the jury. The record further established that counsel was not ineffective.

Generally, when reviewing unpreserved constitutional error we first determine whether the error was plain, i.e., clear or obvious, *People v Grant,* 445 Mich 535, 548-549, 552; 520 NW2d 123 (1994), and, if so, whether the error could have been decisive of the outcome or falls under the category of cases where prejudice is presumed or reversal is automatic. *Id.* at 553. However, in the instant case, we conclude that the error was not simply unpreserved, but was affirmatively waived by the strategic decision of defendant to forego objection to admission of the second statement.

Defendant did not testify. He presented his defenses of self-defense and accident through his statements. The second statement was consistent with his defenses and was only inculpatory in the sense that it added information regarding the victims being armed that was not provided in the first

statement. At a *Ginther*[4] hearing, counsel testified that in consultation with defendant[5] he made the strategic decision that the second statement would help more than harm defendant's case by elaborating on the details and providing evidence that the victims were armed. He acknowledged the potential harm that could result from the prosecution stressing the inconsistencies, but felt that the harm could be minimized by focusing on the fact that the first statement was taken in the field, was given when defendant was under stress, and was not really inconsistent, because defendant had not said that the victims were without weapons, only that he did not see them with guns. Counsel testified that he had spoken to members of the first (hung) jury who reported that the jury had voted eleven to one in favor of defendant and that only one juror hung the jury. Counsel determined that his strategy in the first trial had been a sound approach. Under the circumstances, we conclude that defendant made a strategic decision to permit introduction of the second statement and cannot now urge reversal on that basis.

In order to establish ineffective of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Decisions regarding what evidence to present and whether to call a witness are presumed to be matters of trial strategy. *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997). Moreover, that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand),* 219 Mich App 38, 42; 555 NW2d 715 (1996). Counsel's strategy with respect to the second statement did not fall below an objective standard of reasonableness.

IV

We also reject defendant's claim of ineffective assistance of counsel based on failure to request an intervening cause instruction on suicide. Given the court's instructions, there is no reasonable probability that the outcome would have been different had the instruction been requested and given.

V

Defendant's remaining claims, that the trial court prevented him from presenting his defense of self-defense and improperly abridged his right of cross-examination by not allowing him to show why he feared Hill and Cargile, relate to his second trial. Defendant argues that his defense was a combination of self-defense and accident - - that after the initial confrontation with the men, defendant armed himself because he feared they would return with guns to shoot him; when they did return minutes later and rushed at him, defendant drew his gun, which then discharged accidentally when Cargile attacked him. Defendant contends that he was improperly precluded from presenting evidence that Cargile and Melvin and Karl Hill were drug dealers, and were thus likely to have access to guns, and evidence that defendant had told the officer who took the first statement that he "knew" Hill and Cargile were carrying guns.

With regard to the alleged drug involvement, defendant points to the following colloquy at the conclusion of defense counsel's cross-examination of Karl Hill:

Q. [*Defense Counsel*]: Mr. Hill, isn't it true that you're in the drug business in that neighbor --

[*Prosecutor*]: Objection.

THE COURT: Sustained.

The jury should disregard that statement. The defense counsel should not have made that statement.

Q. [*Defense counsel*]: Were you – - you had some kind of relationship other than just friendship with Melvin and Antwan?

A. No, Melvin is my cousin. We're more like brothers, but Antwan is Melvin's friend.

Q. Do you have any business relationship with either one of them?

[*Prosecutor*]: Objection.

THE COURT: Sustained.

[*Defense Counsel*]: That's all I have, Judge.

While the trial court did rule on the objection summarily,[6] defense counsel appeared to accept the ruling. Counsel did not make an offer of proof and did not explain to the court why the evidence was relevant, admissible, and more probative than prejudicial. Counsel never explained the purpose of the questions or the information sought. Under the circumstances, reversal is not warranted.

Defendant additionally contends that the trial court erred in refusing to allow defendant to establish the entirety of his first statement to police. In his first statement, as presented to the jury, defendant said that he had not seen any guns; in his second statement he said that he had seen guns. Defendant complains that when he sought to show that in his first statement he had told police that he "knew or believed" that the men had guns, he was not permitted to do so in violation of MRE 106.

On cross-examination, defense counsel attempted to elicit certain information:

Q. [*Defense counsel*]: Did at some point in your discussions with Mr. Macklin did he tell you that he knew any of these men to carry a gun?

A. [Officer Tolbert]: At which point? Not during the statement.

Q. During this other conversation. How many times did you talk to Mr. Macklin when he was in the custody of the 8th Precinct?

A. I talked to him just the one time. I asked him a question the next time if he wanted to use the phone and did he know the phone number of the people.

Q. Now at any point in your conversations with him, with Mr. Macklin, was there a discussion about whether he knew or believed these another [sic] guys to carry weapons?

[*Prosecutor*]: That would be objectionable, your Honor.

THE COURT: Sustain.[7]

When the officer was excused from the stand, defense counsel addressed several matters, including the testimony he sought to elicit regarding the weapons:

[*Defense counsel*]: Yes, your Honor. There was a question I posed, I don't even know if I got to the question, I'm not sure exactly if I asked it , but it would have been did Mr. Macklin tell you that he thought these other guys had guns, or that he know these other guys carry guns. Now, the objection to that would be hearsay, of course, but my response would be it's not offered for the truth of the matter asserted. It goes to the state of mind of Mr. Macklin which is absolutely critical to our defense and as an element of the defense of self-defense, reasonable belief that he's in danger. And the way it went, I didn't really have an opportunity to make my argument, but I think that's certainly an exception that takes that out of the Hearsay Rule.

THE COURT: All right. The ruling will stand. The record is complete.

Defendant did not assert below the error asserted on appeal. Defendant maintained in the trial court that the statement was not hearsay. On appeal, he argues that admission was required under the doctrine of completeness. An appellate court is obligated to review only issues properly raised and preserved below. *Stanaway, supra* at 694. We find no manifest injustice warranting further review of the unpreserved claim of error under the circumstance that the first statement as read to the jury included the following:

Question: Why did you take the gun out the house?

Answer: I was going back across the street to play cards again. **I thought they were going to get some guns and come back, so I put the gun in my waistband.**

Question: How many times did the gun fire?

Answer: Once or twice. When he rushed me, the gun went off. **I didn't want to hurt anyone, but I wanted them to know I had a gun too.**

Affirmed.

/s/ Helene N. White
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] Defense counsel argued:

> There's one other thing I want to mention to you on the murder count. The Court's going to instruct you that the act of the defendant must be the cause of death, and that it's not enough that the defendant's act made it possible for the death to occur. I'm not going to say a lot about this, but you heard that Melvin Hill was a paraplegic [sic quadriplegic] in the hospital. When he's alive, all of a sudden that tube in his throat is out and then dies. You've got to look at the cause of death there. How did that tube get out of his throat? That's all I want to say about that. Listen to the instructions from the judge about it.

[2] See LaFave & Scott, Criminal Law, § 35, p 259:

> What then, of suicide by the victim? If *A* wounds *B* with intent to kill, but thereafter *C* shoots *B* with intent to kill and does kill him instantly, we know that *A* is not the cause of *B*'s death. If, instead, *B* takes his own life, we again have a deliberate act directed toward killing *B* which has intervened, so one might expect the same result. Such a result is certainly appropriate when *B* commits suicide from some motive unconnected with the fact that he is wounded, but suicide is not abnormal when *B* acts out of the extreme pain of wounds inflicted by *A* or when the wound has rendered him irresponsible. Although voluntary harm-doing usually suffices to break the chain of legal cause, this should not be so when *A* causes *B* to commit suicide by creating a situation so cruel and revolting that death is preferred.

[3] Defendant gave police a statement on March 1, 1995, the morning after the shooting. He was later arraigned on assault and felony-firearm charges and provided with counsel. Subsequently, on March 7, after Hill died, defendant gave a second statement. The statements were inconsistent on the issue whether defendant observed the other men with guns during the incident. The prosecutor argued the inconsistencies at trial. Defendant asserts that his Sixth Amendment right to counsel was violated when police initiated discussions with him without counsel after he had been arraigned. The prosecutor asserts that defendant's Sixth Amendment rights attached only to the assault charge on which he had been arraigned, and not to the murder charge, as to which adversarial proceedings had not begun.

A defendant's Sixth Amendment right to counsel attaches at or after the initiation of formal adversarial proceedings by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). After formal

adversarial proceedings have begun and the defendant has requested counsel, 'the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges or conversations with the police,' and knowingly and intelligently waives the right he had invoked. *Id*; *People v Crusoe*, 433 Mich 666, 669, 682-683; 449 NW2d 641 (1989). The Sixth Amendment right to counsel is offense specific and cannot be invoked once for all future prosecutions, as it does not attach until at or after the initiation of adversary judicial criminal proceedings. *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991). Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked right at an arraignment on unrelated charges. *Crusoe*, *supra* at 696.

However, the Sixth Amendment right to counsel extends to interrogations on new charges "where the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."' *United States v Doherty*, 126 F3d 769, 776 (CA 6, 1997), quoting *United States v Hines*, 963 F2d 255, 257 (CA 9, 1992). "To hold otherwise would allow the government to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes after questioning him without counsel present." *Doherty, supra* at 776, quoting *United States v Arnold*, 106 F3d 37, 41 (CA 3, 1997).

In *Doherty*, the defendant was arraigned in an Indian tribal court for statutory rape of one of his stepdaughters, at which time he indicated that he wanted counsel and that his mother was attempting to find him counsel. He was taken to the tribal police station where he remained in custody, and was questioned by an FBI agent, who suspected he had violated federal law. During the interview he admitted to sexually molesting his two stepdaughters on numerous occasions. 126 F3d at 772-773. The court noted that because the same underlying conduct formed the basis for both the tribal and federal charges, the defendant's right to counsel would have attached simultaneously to both charges, were it applicable. [The right to counsel was found inapplicable because the United States Constitution's guarantees of individual rights, including the right to counsel, do not apply in tribal courts.] The *Doherty* court did not reach the question of how inextricably intertwined two offenses must be so that the Sixth Amendment right to counsel attaches simultaneously with respect to both offenses, but noted that the Supreme Court in dicta has suggested that "it is the subject matter of he interrogation, and not any formal distinction in the elements of the underlying charges, that is relevant for Sixth Amendment purposes." *Doherty, supra* at 776, citing *Brewer v Williams*, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977) (reversing on Sixth Amendment grounds a murder conviction resulting from the defendant's confession given before his indictment for murder, but after his indictment on a charge of kidnapping, based on the same facts).

In the instant case, defendant was initially charged with assault with intent to commit murder in connection with the shooting of Melvin Hill. At the time of defendant's first statement on March 1, 1995, he had been arraigned on the assault with intent to commit murder charge alone. The case was assigned to the Homicide section after Hill died on March 6, 1995. At the time of defendant's second statement on March 7, 1995, he had not yet been formally charged with homicide, thus adversarial

proceedings on that charge had not begun. He was charged on March 9 and arraigned on March 10, 1995 on the murder and felony firearm charges. However, the assault with intent to murder charge was based on the same underlying conduct as the murder charge. The subject matter of both interrogations was the same, and defendant's actions subjecting him to criminal liability were the same. The only difference between the two charges is that the assault charge as to which the right to counsel had attached had ripened into a murder charge because the victim had died.

[4] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973)

[5] Defendant denied the consultation described by counsel.

[6] The court's rulings on objections were made summarily, without entertaining argument and with little explanation, throughout the trial. While experienced trial judges can often anticipate the reasons for asserting objections, and the countervailing arguments in favor of the admissibility of the evidence, trial judges must remember that counsel often have different reasons and arguments, not always apparent without further explanation. Further, counsel must be permitted to make a record, and appellate review is facilitated by a record of the basis for objections, the arguments for admissibility, and the reasons for the court's ruling on the objection.

[7] The questions not permitted in the second trial were, in fact, asked and answered in the first trial:

> Q. From your discussions with him afterwards, was it clear to you that Lester believed these other men were armed?
>
> A. I don't recall he did. I'm sorry. I do recall. He did state that the, he knew that the deceased carried a weapon on him.
>
> Q. In other words, that he was, that the deceased was known to carry a weapon?
>
> A. Right.
>
> Q. Did Mr. Macklin at any time indicate to you that he was in fear for his safety when this incident occurred?
>
> A. Yes, he did.
>
> Q. He told you that?
>
> A. Yes, he did.